FILE COPY

Office-Supreme Court, U.S.
FILED
AUG 31 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1959

No. 246

JOHN SYPERT,

Petitioner,

vs.

HONORABLE JULIUS H. MINER, a Judge of the United States District Court for the Northern District of Illinois, Eastern Division,

Respondent.

PETITIONER'S REPLY BRIEF

JAMES A. DOOLEY,
111 West Washington Street,
Chicago 2, Illinois,
STate 2-1453,
Attorney for Petitioner.

Midwest Law Printing Co., 326 N. Michigan Ave., Chicago
Telephone: Financial 6-3988

IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1959

No. 246

JOHN SYPERT,

Petitioner,

vs.

HONORABLE JULIUS H. MINER, a Judge of the United States District Court for the Northern District of Illinois, Eastern Division,

Respondent.

PETITIONER'S REPLY BRIEF

Respondent in his answer would treat this matter as if there had been but one order of transfer ordered. The question here is not whether the District Judge properly exercised his discretion, as Respondent would make it appear, or whether the Court of Appeals erred in failing to overrule that discretion. The issue is one never determined by this Court and which should be, if there is to be intelligent implementation of Section 1404(a): That ques-

tion is: Can there be plural orders of transfer even after a trial in the forum once determined to be proper? Specifically, did the Respondent have the power under Section 1404(a) to make a new determination of that issue? Was it intended by Congress that Section 1404(a) provide for multiple determinations of that forum which is "for the convenience of parties and witnesses, in the interest of justice?" If there can be a second determination of the propriety of the forum, so can there be three or four determinations, whether made after a trial resulting in a jury disagreement, or upon the granting of a new trial by the Court on motion after verdict and judgment, or upon the reversal by a Court of Appeals and remandment to the District Court for a new trial. If multiple determinations are permissible, then Section 1404(a) can be employed as a simple expedient of avoiding a judicial obligation as the Fifth Circuit clearly envisioned. (*Atl. Coastline* v. *Davis*, 185 F. 2d 769 (C.A. 5).)

The conflict between the Fifth and Seventh Circuits on this specific issue has a real meaning to this specific case. The cause has been transferred to the Fifth Circuit. A District Judge of the Fifth Circuit or the Fifth Circuit itself can be expected to adhere to its decision in the *Atlantic Coastline* case and order this cause transferred to the United States District Court at Chicago.

Thus, when Respondent states: "In effect, the Petitioner must necessarily contend that the trial court abused his discretion in granting the transfer and that the Court of Appeals abused its discretion in denying the Petition for Mandamus," (p. 1.) he is avoiding the issue here presented.

I.

RESPONDENT'S STATEMENT OF FACTS.

We regret that we must call the Court's attention to certain gross discrepancies in the facts as represented by Respondent, and the Record.

To demonstrate the total lack of factual support for Respondent's Brief, we append a summary of various statements taken from that document contrasted with the record.

Respondent's Statement.	The Record.
(a) Five of the witnesses testifying in the trial resided in Dallas, Texas, at the time of the trial and were transported from Dallas, Texas, to Chicago for the purpose of the trial. (Resp. Brief, p. 4)	Three of the five witnesses, Dowdy, Carter and plaintiff, were brought to Chicago by plaintiff. As to the remaining two, Watson, one of them, in an affidavit supporting defendant's original motion stated: "I would not voluntarily go to Chicago in order to testify in any trial resulting from this accident." Yet he went to Chicago and testified.
(b) One witness, a Mr. Carter, who testified for the plaintiff on rebuttal was also a resident of Dallas, Texas, and was transported from Dallas to Chicago and returned on two occasions during the trial. (Resp. Brief, p. 4)	Carter stated under oath that he had been brought to Chicago by defendant, but not used, and we placed him on the stand.

(d) The only other witness testifying in behalf of the plaintiff at the trial was Chief Petty Officer John Trunda who was stationed at the Naval Air Station at Glenview, Illinois, and who was first brought into the case by plaintiff's attorney the day before the trial was commenced and who testified to the workings of an oxygen regulator. (Resp. Brief, p. 4).	Trunda was in charge of oxygen regulators at Great Lakes. Experts in this field, not employed by aviation companies, are hard to find. Plaintiff did not have the regulator in question, defendant claimed never to have seen it, and Trunda brought into court two regulators and a chart, the property of the U. S. Government, without which no jury could understand the issue.
(g) The testimony of several witnesses, all of whom reside in Dallas, Texas, had to be offered by means of deposition. (Resp. Brief, p. 4).	Only one deposition was read on the trial, that of plaintiff's witness Dr. Grafton. Plaintiff's injuries were not contested.
(h) Other witnesses who resided in Texas did not testify in the trial and could not be brought in by process of this court. (Resp. Brief, p. 4).	This statement has no foundation in the record. At no time during the trial was there any evidence of the omission of testimony.
(i) The defendant contended that certain documents, reports and exhibits available and subject to production by subpoenas in the United States District Court of Dallas, Texas, could not be made available in this district through lack of process and had to be omitted in the trial. (Resp. Brief, p. 4).	This statement has no foundation in the record. At no time in the trial was there any evidence that documents available by subpoena in Texas were wanting.

(j) The facts in the instant motion for transfer were different in many respects from those which arose in the original motion. (Resp. Brief, p. 5).	The facts were more favorable towards leaving the case in Chicago at the time of the second motion. The defendant's principal place of business had been moved from Teterboro, New Jersey, to Davenport, Iowa, only 165 miles from Chicago; defendant's representative at the trial and its principal witness were both from Davenport; plaintiff's principal witness was in Glenview, Illinois, and cannot go to Texas; trial counsel have both familiarized themselves with the case.
(k) It appears that every occurrence witness resides in or near Dallas. (Resp. Brief, p. 5).	The only record before Respondent consisted of affidavits. It is clear from this record that there was only one occurrence witness, Dowdy, who was called by plaintiff. The record demonstrates that the defendant was not deprived of the testimony of any witness.
(p) There was no showing that the witness, John Trunda, could not conveniently go to Texas if the case was transferred to that district. (Resp. Brief, p. 5).	This fact appears under oath; it was not controverted.

(q) It does not appear that expert testimony comparable to the testimony given by John W. Trunda could not be obtained if the case were transferred to Texas as this witness admitted upon cross examination at the trial before the Hon. Judge Hoffman that:

"The first time he heard of the case and the first time he met the plaintiff or Mr. Dooley or Attorney Wilson was on January 12, 1958, about noon time. Mr. Dooley called John Trunda on the telephone at Glenview, Illinois, and asked if he might come to see him. This was the day that Mr. Sypert * * *, Mr. Dowdy, with plaintiff's attorney, John B. Wilson, arrived by plane from Dallas, Texas, and for the first time discussed with John Trunda at Glenview, oxygen regulators and their operations." (Exhibit 7, page 58).

It also appears from the record that John W. Trunda was not a highly trained expert in the field of oxygen regulators and that he had only two short courses and no instructions on oxygen regulators and their operations. (Resp. Brief, p. 6).

These gratuitous statements were not in the record before the Respondent and were not presented under oath.

Thus it appears that the "statement of facts" relied upon by Respondent to justify his order transferring this case is not a statement of facts at all, and lacks support in the record.

II.

Respondent urges that there was a change in circumstances between the time of the two petitions. Under the previous heading, we have shown that the only change was one which should prompt the Chicago court to retain jurisdiction, if that were again debatable. The court did not find that there was any change in circumstances.

This, however, it seems to us, is entirely immaterial. The question of transferring this cause had been argued and decided; relying on the validity of this decision, the Petitioner went to great effort and expense to prove his case. It is now sought to strip him of the fruits of his labor on some fancied doctrine of "convenience". We submit that in simple justice no multiple determination of this question should be permitted.

III.

Respondent here argues as though the question of transfer of the case were being presented for the first time, completely ignoring the fact that the issue had already been decided in favor of Petitioner. The question at this time is not whether the equities would be best served by transferring this case (although on that issue we believe the weight of the evidence lies with Petitioner), but whether multiple determinations of this question can be made. Respondent does not meet this question.

IV.

The question here is not whether the decision of the District Court was such an abuse of discretion as would justify issuance of the writ of mandamus. The question at issue is whether there can be multiple and repeated determinations of the propriety of a transfer of the case. The question is whether, when that issue has been litigated and decided, and the parties have followed and pursued the course of action required by the decision, a court of co-ordinate jurisdiction is authorized to open up the matter and decide it again, in a way contrary to the original decision.

Every case cited by Respondent under this heading has to do with the original determination of the proper forum. In no case was there a multiple finding.

CONCLUSION.

The question at issue here has been raised before and will be met again unless it is settled at this time. It is of great importance that the Court indicate whether, when the question of venue under Section 1404(a) has been decided, that decision is to be final throughout the case.

Respectfully submitted,

JAMES A. DOOLEY,

Attorney for Petitioner.